Filed 2/4/05 Michelle W. v. Superior Court

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

MICHELLE W.,

Petitioner,

v.

THE SUPERIOR COURT OF MERCED COUNTY,

Respondent,

MERCED COUNTY HUMAN SERVICES AGENCY,

Real Party in Interest.

F046766

(Super. Ct. No. 27007)

OPINION

THE COURT*

ORIGINAL PROCEEDINGS; petition for extraordinary writ. Frank Dougherty, Judge.

Deborah A. Bennett, for Petitioner.

No appearance for Respondent.

Ruben E. Castillo, County Counsel, and James B. Tarhalla, Deputy County Counsel, for Real Party in Interest.

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* Before Vartabedian, Acting P.J., Cornell, J., and Dawson, J.

Petitioner seeks an extraordinary writ (Cal. Rules of Court, rule 38 (rule) [formerly rule 39.1B]) to vacate the orders of the juvenile court terminating reunification services and setting a Welfare and Institutions Code section 366.26 hearing[1] as to her daughter A. She claims the juvenile court erred in finding that she was provided reasonable services and that a substantial risk of detriment precluded return of A. to her custody. We will deny the petition.

STATEMENT OF THE CASE AND FACTS

Petitioner has a significant history of child welfare intervention. Between June 1997 and July 2003, child protective services documented 30 referrals for general to severe neglect as well as physical and emotional abuse. Petitioner was offered but refused family maintenance services in June 1998, November 1999 and March 2002.

The instant dependency proceedings were initiated in August 2003 when the Merced County Human Services Agency (agency) responded to a motel room where petitioner was living with her three sons, then eight-year-old D., seven-year-old R. and five-year-old I., and two daughters, then six-year-old R.W. and five-month-old A. The responding social worker found D. and R. standing in a corner and I. with dried blood around his nose and on his shirt. The social worker determined that petitioner hit I. in the face and that the family was homeless.

The juvenile court detained the children and sustained allegations petitioner's negligent failure to protect the children placed them at risk of harm and the children's alleged fathers failed to provide support. (§ 300, subds. (b) & (g).) At the dispositional hearing on October 21, 2003, the court ordered the agency to refer petitioner for domestic violence and mental health counseling and parenting education. The court set the six-month review hearing for April 19, 2004, and the children were placed in foster care.

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[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

Over the next six months petitioner made significant progress in her case plan. She completed a parenting class and participated in mental health counseling. However, she was unable to control her children during visitation and expressed frustration at her inability to comfort A. who had developed a strong attachment to her foster mother.

Concerned about petitioner's history of child abuse, the agency referred her for a psychological evaluation which petitioner completed in March 2004. After conducting a clinical interview and a battery of psychological tests, the examining psychologist diagnosed petitioner with intermittent explosive disorder, nonspecific personality disorder and borderline intellectual functioning. The psychologist elaborated in his report, stating:

> "Though [petitioner's] functioning is not at a level that would prevent her from providing adequate care for her children, it should be expected that she will progress slowly. [¶] … [¶] Reunification should proceed gradually and [petitioner's] functioning should be monitored closely by her family therapist. It might be appropriate to reunify her with one child, wait one month, and then add another child to the household. [¶] … [¶] It should be born in mind that [petitioner] will learn slowly, and has a tendency to offer shallow explanations and rationalizations for her behavior. It should also be born in mind that she expressed no parenting strategy other than, 'a whoop on the butt.' Her children were detained after she caused injury to a child in an effort to use [t]ime [o]ut. She has much to learn and reunification should proceed cautiously."

In addition to the services already ordered, the psychologist recommended the department refer petitioner for family therapy and assist her in managing a household.

As a result of the psychologist's evaluation, the agency recommended the court continue reunification services for another six months. The agency reported that it would assist petitioner with housing and refer her for family therapy. Once petitioner obtained stable housing, the agency would begin overnight visitation with the goal of reunifying the children with petitioner one-at-a time.

The six-month review hearing was continued and conducted on April 21, 2004. The court found the agency provided reasonable services, continued reunification services and set the 12-month review hearing for October 21, 2004.

In June and July 2004, after successful 30-day home trial visits, the court granted the agency's section 388 petitions to return the four oldest children to petitioner under a plan of family maintenance. The court set October 21, 2004, as a combined six-month family maintenance review for D., R., I. and R.W. and a 12-month review of family reunification for A.

In its status review for the combined hearing, the agency reported that petitioner had not completed domestic violence counseling and was in partial compliance with mental health counseling and in-home parenting assistance. However, her service providers described the home environment as chaotic and petitioner as scattered and overwhelmed by the demands of the four oldest children. They doubted her ability to develop a parent/child bond with A. and to take on the additional responsibility of her full time care.

Petitioner's mental health counselor stated, that after a year of therapy, petitioner continued to exhibit poor judgment, coping and boundary setting skills. The counselor estimated petitioner's emotional development to be that of an 11 to 13 year old and concluded it would take several years to reshape petitioner's personality.

Petitioner's in-home parent educator seriously questioned petitioner's ability to parent all five children. She doubted petitioner's ability to manage the high demands of the four older children especially in light of recent reports of sexualized behavior between two of the boys. She was even more skeptical about petitioner's ability to assume custody of A. given the lack of parent/child bond and petitioner's inability to interact and comfort A.

The agency recommended the court find petitioner's progress with regard to the oldest four children as sufficient and satisfactory and continue family maintenance

services for another six months. As to A., the agency recommended the court find petitioner's progress in her case plan was unsatisfactory and insufficient and that return of A. to her custody would be detrimental. Consequently, the agency recommended the court terminate reunification services.

On October 21, 2004, the court conducted the combined review hearings. The court continued family maintenance for the oldest four children and set a 12-month family maintenance review for January 20, 2005. The court also set a contested 12-month review hearing for A. on November 9, 2004.

At the contested 12-month review hearing on November 9, 2004, petitioner made an offer of proof that she was capable of taking care of A. but that if the court were concerned that she could not handle all five children, her mother could take care of R. She also attributed the lack of attachment to A.'s removal at such a young age and their infrequent visitation.

After argument, the court found the agency provided petitioner reasonable services but that she did not regularly participate in her court-ordered services, citing her failure to establish a parent/child bond with A. and her minimal progress in addressing her domestic violence and mental health issues. The court terminated reunification services and set a section 366.26 hearing. This petition ensued.

Real party in interest urges this court to dismiss the petition on the discretionary ground that it is facially deficient because it fails to assert juvenile court error. We find the writ petition clearly sets forth alleged error and fully comports with the procedural requirements of California Rules of Court, rule 38.1(a)-(b) (formerly rule 39.1B(j)). Therefore, we decline to dismiss the petition and will review it on its merit.

DISCUSSION

I. Petitioner was provided reasonable services.

Petitioner claims the agency did not provide her reasonable services because it knew her difficulty bonding with A. was a barrier to reunification and it took no action to

facilitate a parent/child bond. She claims offering a nurturing class and increasing the frequency of visitation could have accomplished this.

Real party in interest argues petitioner waived her right to challenge the reasonableness of services on appeal by failing to raise this issue before the juvenile court. While it is generally true points not urged in the trial court cannot be raised on appeal, the contention that a judgment is not supported by substantial evidence is an exception to the rule. (*In re Brian P*. (2002) 99 Cal.App.4th 616, 623.) Therefore, we conclude the waiver doctrine does not bar petitioner from challenging the court's reasonable services finding. Nevertheless, we find no merit to her claim.

Reunification services are reasonable if they address the problems that required removal of the child from parental custody and the supervising agency made reasonable efforts to facilitate compliance. (*In re Ronell A*. (1996) 44 Cal.App.4th 1352, 1362.) Petitioner's case plan became effective at the dispositional hearing conducted in October 2003. Petitioner did not challenge the reasonableness of the plan by appealing from the juvenile court's dispositional order or from the juvenile court's finding issued at the six-month review hearing that she was provided reasonable services. Nor did she at any time during these dependency proceedings petition the juvenile court to modify her case plan. (§ 388.)[2] Consequently, by failing to challenge the content of the reunification plan by direct appeal, petitioner waived any claim that the plan as ordered was unreasonable. (*In re Julie M*. (1999) 69 Cal.App.4th 41, 46-47.) Our review then is limited to whether the appellate record discloses substantial evidence to support the juvenile court's finding that the agency made reasonable efforts to facilitate reunification recognizing that the standard is not whether the services provided were the best that might be provided in an

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2 Section 388 allows the parent of a child adjudged a dependent of the juvenile court to petition the court to change, modify or set aside any order upon grounds of change of circumstance or new evidence.

ideal world, but whether the services were reasonable under the circumstances. (*In re Misako R*. (1991) 2 Cal.App.4th 538, 547.)

In this case, we conclude substantial evidence supports the court's finding the agency made reasonable efforts to help petitioner develop a bond with A. The agency referred petitioner for a parenting class, which petitioner completed. The agency also provided petitioner in-home parent education with the specific purpose of helping her bond with A. According to the parent educator, A. demonstrated the ability to bond with petitioner. It was petitioner who struggled with bonding. She was demonstrably uncomfortable and afraid to interact with A.

Moreover, there is no evidence that increased visitation or removal of one of the other children would have facilitated a bonding between petitioner and A. Despite her best efforts, petitioner was simply unable to make an emotional connection with A. and there is no reason to conclude from this evidence that more frequent contact or fewer children to manage would have cured that.

II. The court properly found that returning A. to petitioner's custody would place A. at risk of detriment.

Petitioner challenges the sufficiency of the evidence supporting the court's finding of detriment. She claims the same evidence of her compliance was simultaneously used to continue family maintenance for her four older children and terminate reunification services as to A. This disparity, she argues, resulted in irreconcilable findings. If there was insufficient evidence of detriment to permit continued family maintenance for the children already in petitioner's care, then there was necessarily insufficient evidence of detriment to warrant terminating reunification services. We disagree.

The problem with comparing the court's rulings is that the five children were differently situated. The four oldest children were under a plan of family maintenance and A. was under a plan of family reunification. While maintenance and reunification services are part of the continuum of child welfare services, they differ in their purpose.

(§§ 16506 & 16507.) Family maintenance services are provided to maintain a child in his or her own home. (§ 16506.) They are generally limited to six months but may be extended for one six-month period if the court finds that the objectives of the service plan can be achieved within the extended period. (*Ibid*.) In this case, there was evidence that petitioner, though struggling, was making progress in her parenting of the older four children. With the assistance of the parent educator, she established some household rules and had improved her ability to manage their daily routine. Based on her progress, the agency concluded she could benefit from continued family maintenance with monitoring.

Reunification services, on the other hand, are provided to reunite a child placed in out-of-home care with the parent and are generally limited to 12 months. (§ 16507.) At the 12-month review of reunification services, the juvenile court must return the child to the parent's custody unless it finds by a preponderance of the evidence, return of the child to parental custody would create a substantial risk of detriment to the child's safety or well-being. (§ 366.21, subd. (f).) The parent's failure to participate regularly and make substantive progress in a court-ordered treatment program is prima facie evidence of detriment. (*Ibid*.) Conversely, technical compliance with court-ordered services is not conclusive in determining detriment. (*In re Dustin R*. (1997) 54 Cal.App.4th 1131, 1141-1142.) Rather, the primary determinant is whether the parent's progress eliminated the conditions leading to the child's placement out of the home. (*Ibid*.) On appeal, we review the juvenile court's finding of detriment for substantial evidence. (*Angela S. v. Superior Court* (1995) 36 Cal.App.4th 758, 763.)

In this case, we conclude substantial evidence supports the juvenile court's finding of detriment. Petitioner's children were removed from her custody because of neglect and child abuse. The psychologist concluded she had borderline intellectual functioning and recommended the children reunify with petitioner on a graduated basis. The psychologist's assessment of petitioner's limited functioning was born out by her

interactions with her children and her impaired decision-making ability. Nevertheless, she successfully regained custody of four of her children with the supervision and monitoring of the agency. However, despite marked improvement in her ability to handle her four oldest children, she was overwhelmed and struggling. At the same time, she was unable to bond with A., who had already grown attached to her foster parents. Under these circumstances, given petitioner's history of abuse and neglect, her limited parenting skills and the great demand already placed upon her, it would have been detrimental to A. to place her back in petitioner's care.

III. The court properly terminated reunification services.

Petitioner argues there was sufficient evidence A. could have been returned to her custody with continued services and therefore the court erred in not continuing reunification services. We disagree.

At the 12-month review hearing, the juvenile court may continue reunification services and set a permanency review hearing provided the hearing occur within 18 months of the date the child was originally taken from parental custody. (§ 366.21, subd. (g)(1).) The court shall continue the case only if reasonable services were not provided or there is a substantial probability the child will be safely returned to the parent within the extended period of reunification. (*Ibid*.) We have already concluded petitioner was provided reasonable services. Therefore, her only arguable ground for continued services is that there was a substantial probability A. could be returned to her custody with continued services.

In order to find a substantial probability that the child will be returned to parental custody within the extended period of time, the court must find all of the following: (1) that the parent consistently and regularly contacted and visited the child; (2) that the parent made significant progress in resolving problems that led to the child's removal from the home and (3) that the parent demonstrated the capacity and ability to complete the objectives of her treatment and to provide for the child's safety, protection and well-

being. (§ 366.21, subd. (g)(1).) While it is undisputed petitioner regularly visited A., she was unable to demonstrate the capacity to provide for A.'s safety and well-being. Through no fault of her own, she lacked the requisite parenting and coping skills to care for A. and, according to petitioner's counselor, it could take several years to effect any change. We find no error.

DISPOSITION

The petition for extraordinary writ is denied. This opinion is final forthwith as to this court.